IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.4391 OF 1989

Uma Mangesh Karnik - since deceased through LRs. Petitioners

versus

Om Buddhi Co-operative Housing Society Limited and others Respondents

ALONG WITH
WRIT PETITION NO.4396 OF 1989

Smt.S.D.Samant-since deceased through LRs. Petitioners

versus

Om Buddhi Co-operative Housing Society Ltd. and others Respondents

ALONG WITH
WRIT PETITION NO.3904 OF 1989

Lissy Joseph and others Petitioners

versus

Om Buddhi Co-operative Housing Society Limited & others Respondents

ALONG WITH
WRIT PETITION NO.4397 OF 2001

Nalini Chandru Chainani Petitioner

versus

Om Buddhi Co-operative Housing
Society Ltd. & others Respondents

APPEARANCE :-

In WP No.4391/1989 :

Mr.A.Y.Sakhare, Sr.Adv. with Mr.Siddharth Karpe, adv. for petitioners.
Mr.R.V.Govilkar, adv. for respondents 1, 3, 4, 7, 9 to 12.
Mr.B.S.Govlekar, adv. for respondent no.2.

In WP No.4396/1989 :-
None for petitioner.
Mr.R.V.Govilkar, adv. for respondent no.1.

In WP No. 4397/1989 :-
Mr.Siddharth Karpe, adv. for petitioners.
Mr.R.V.Govilkar, adv. for respondents 1 to 4.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 20.04.2006
DATE OF PRONOUNCING THE JUDGEMENT : 03.07.3006

JUDGEMENT :

1. These petitions under Articles 226 and 227 of the Constitution of India although filed by distinct petitioners, have common facts and question of law. They were heard together and are being disposed of by a common judgement.

2. These petitions question an Appellate order (delivered by Maharashtra State Appellate Court) in several Appeals filed to challenge the order and award of the Co-operative Court. The petitioners claimed to be members of a society

(respondent no.1). All of them seek identical relief namely that they be held as such and residential accommodation be made available to them. According to them, denial of residential accommodation/flats to them despite making payment or contributing monies, is a breach of bye-laws of the Co-operative Housing Society and is otherwise an arbitrary and discriminatory act on its part. Such pleas and contentions were negatived by the Trial Judge in all cases but one. The appeal by the Co-operative Housing Society, against the judgement of the Trial Judge in that case has been allowed and the dispute of the petitioner dismissed. In other matters, the Trial Court order dismissing the dispute filed u/s 91 of the Maharashtra Co-operative Societies Act, 1960 has been upheld by the Appellate Court. Aggrieved and dissatisfied by the judgement and order of the Lower Appellate Court, the petitioners-original disputants have invoked this Court’s jurisdiction under Articles 226 and 227 of Constitution of India.

3. The principal allegations in all these disputes are that the petitioners joined others in forming a co-operative housing society. The co-operative housing society was formed some time

in the year 1977. The petitioners applied for a flat therein. Their offers were accepted and there are communications in that behalf. The price of the flat was agreed upon and was to be paid in instalments. Some of the petitioners desired a larger flat and agreed to pay higher sums. They relied upon such agreements. The other contention which is material and important to note is that the society was formed by and consisted of employees of Brihan-Mumbai Mahanagarpalika (MCGB). They were to get loan from their employer. The people are middle class people. Once contributions are made periodically and as per time schedule, then they were eligible for a flat/accommodation.

4. They were waiting for allotment in their favour after paying monies but enquiry with the office bearers revealed that there was some delay. The replies were not clear but were vague. Suddenly, the petitioners received communications informing them that they would not be entitled to the residential accommodation. Thereafter, correspondence ensued which involved advocates as well.

5. On learning that the society is allotting

flats to other persons, the disputes came to be filed in the Co-operative Court at Mumbai.

6. The disputes were amended because respondents to these petitions were inducted as members and flats were allotted to them purportedly. Hence, amendment was carried out. The allottees were made parties and necessary averments incorporated in the dispute. The argument is that once an assurance has been given to the members such as petitioners, of allotment of flats and they having paid the amounts stipulated, by instalments within the prescribed period, then other persons have no right to become members and the society does not have right to admit them so also to allot them the flats earmarked originally for the petitioners.

7. It is not necessary to refer to each individual dispute. The allegations are more or less identical. There is only marginal change with regard to the details of name, payment, area of the flat and date of allotment etc..

8. Thus, all disputes have identical averments and contentions. The prayers are also more or less identical.

9. In substance, invoking the jurisdiction of the Co-operative Court under sections 91 and 96 of the Maharashtra Co-operative Societies Act, 1960 (for short "MCS Act") declarations were claimed together with permanent injunction. The declarations are that the disputants having made full payment for the flat, they alone are entitled to allotment. The allotment made in favour of others is bad in law, not binding upon the disputants, and, therefore, should be held to be illegal. The relief of possession was also claimed.

10. The society after being served with the Writ of Summons filed its reply and denied the contentions. It filed its reply to the original dispute and the amended one as well. Apart from questioning the maintainability thereof it was contended that all the petitioners are defaulters. They cannot exercise their rights of members until they make full payment. They have not made payment/contribution towards construction cost despite a decision of the General Body of the Co-operative Society taken in its meeting held on 7th December 1980. Therefore, they are not entitled to any relief.

11. The society places reliance upon several documents including minutes of the General Body Meeting and counter foils of receipts for payment made by the disputants. In the supplementary written statement, the aspect of allotment to other respondents, was dealt with. It was pointed out that after the persistent default on the part of petitioners and upon specific statement made by them that if they fail to pay the amounts even after the period is extended, that flats/tenements have been allotted to other respondents. Hence, after neglecting to pay the dues despite repeated reminders and society granting extension in that behalf, the petitioners are estopped from contending that the allotment in favour of others, is bad and that they are entitled to the flats/ tenements.

12. All allegations of malafides and misdeeds on the part of the society were dealt with and denied.

13. It is pointed out that after the society was allotted occupation certificate by the MCGB, it allotted flats to members in accordance with the resolution of General Body Meeting held on 7th

December 1980. Persons to whom the flats have been allotted, have taken possession. They are in occupation of the same. Therefore, all allegations made in the amended dispute also are untenable and the dispute be dismissed.

14. The petitioners examined themselves so also others as their witnesses. They were cross examined at length. The society examined it's Secretary who was also cross examined at length. Number of documents were taken on record after even some opponents to the dispute were examined. The society examined handwriting expert as well.

15. The Co-operative Court after framing necessary issues heard learned advocates at length and by a detailed judgement held that all disputes except one deserve to be rejected in toto. In one dispute, a direction was issued to allot flat to the petitioner in the first petition.

16. As far as Writ Petition No.3904 of 1989 is concerned, the dispute was dismissed. As far as Writ Petition No.4396 of 1989 is concerned, the dispute has been dismissed. Same is the result in Writ Petition No.4397 of 1989.

17. The writ petitioner in Writ Petition No.4391 of 1989 having succeeded, the society appealed from the judgement and order of the Trial Court to the Maharashtra State Co-operative Appellate Court. In other cases, the petitioners who were original disputants, upon being unsuccessful before the Trial Court, appealed to the Maharashtra State Co-operative Appellate Court. In the first petition, the Appellate Court took up the appeals of the society as also the allottees and by its judgement and order dated 1st March 1989 allowed the same and reversed the judgement of the Trial Court.

18. As far as appeals in the other petitions are concerned, they were by the original disputants/petitioners before me. All of them have been dismissed.

19. It is in the light of the appellate judgements which are either confirming those of the Trial Court or reversing it, that the petitioners-original disputants have invoked this Court’s jurisdiction under Articles 226 and 227 of the Constitution of India.

20. Shri Sakhre - learned senior counsel appearing for the petitioners submits that the judgements and orders are totally perverse and the Appellate Court has failed to exercise the jurisdiction vested in it in law. The Lower Appellate Court ought to have allowed the appeals of the original disputants and dismissed that of the first respondent society. He submits that overwhelming evidence was placed on record in support of all the pleas by the disputants. He submits that the stand of the society is untenable. He submits that the petitioners are founder members of the society. They are all MCGB employees. They are supposed to contribute only 20% on their own whereas 80% of the amount, which is to be paid as price of the flat, was to come from MCGB by way of loan. The flats/tenements were to be mortgaged. He submits that it is immaterial whether any other events took place, because, admittedly, when the building was ready the society was obliged to inform all persons like petitioners to come and pay the balance amount, if any. However, the society never treated the petitioners as defaulters. He has invited my attention to the averments in the dispute and the reply/written statement of the society and contended that it

was never the case of the society that the petitioners are defaulters. On the other hand, they were treating the petitioners as having committed some acts not befitting their status as members of a society which is formed by MCGB employees. Therefore, now, it cannot be said that the petitioners are defaulters.

21. He submits that the very basis on which the Appellate Court has proceeded, is erroneous. The Lower Appellate Court should have appreciated in one case that for a meagre sum of Rs.960/- which is allegedly outstanding, it is inconceivable that the petitioner would not take prompt steps. Moreso, when larger sums were paid in time. In other words, for the balance of Rs.960/- which is not at all a substantial amount, the petitioner would not have taken any risk and indeed had kept the amount ready. She tendered it after due date on the footing that the same would be duly accepted by the society. He submits that prior to the tender of the sum (last instalment), the petitioner met the office bearers and they assured that the payment would be accepted. All these materials, which are on record, have been ignored by the Lower Appellate Court, and, therefore, this is a fit case for interference in

writ jurisdiction. In substance, his contention is that the Appellate Court's judgement is vitiated by serious errors apparent on the face of record and can be safely termed as perverse.

22. Criticising the manner in which the Appellate Court has proceeded, Shri Sakhre submits that as an Appellate Court it is clear that it could have interfered with the Award on both i.e. facts and on law. The entire matter was before the Appellate Court. It was its duty in law to take note of the factual aspects, issues before the Trial Court and after framing appropriate points for consideration, note all submissions and deal with them in accordance with law. This is the duty of the Appellate Court. This having not been performed and the judgement being totally vulnerable, this is a fit case where this Court should interfere and set aside the judgement of the Lower Appellate Court.

23. Shri Karpe continuing the arguments on behalf of the petitioner in the first petition highlighted the factual aspects in the other matters. In his submission, in the first petition, petitioner succeeded before the Trial Court which gave a very detailed judgement after

dealing with all issues and adverting to the depositions and rival contentions. A detailed and in-depth judgement of the Trial Court has been casually reversed by the Lower Appellate Court. In the other petitions, according to Shri Karpe, both Courts have erred. They have missed certain vital and fundamental aspects of the matter.

24. Shri Karpe took me through the depositions and more particularly of the disputants and the office bearers of the society, certain admissions therein as also resolutions of the General Body dated 7th December 1980 and the circular resolution of 4th January 1981. He submits that the writ petitions, therefore, be allowed and appropriate orders passed directing first respondent society to provide accommodation to the petitioners.

25. On the other hand, Shri Govilkar appearing for the society in all the petitions submits that these petitions are under Articles 226 and 227 of the Constitution of India. They cannot be dealt with as if they are further appeals. There are concurrent findings of fact which are not liable to be interfered within the limited jurisdiction

of this Court. He submits that this Court cannot reappraise and reappreciate the materials and come to a different conclusion even if it is of the opinion that other view is possible. Highlighting limits of writ jurisdiction Shri Govilkar submits that this is not a fit case for interference in writ jurisdiction.

26. Shri Govilkar submits that the arguments proceed on complete misconception about facts. He submits that the petitioner in the first petition is not a share holder/member of the respondent co-operative society. He submits that even a glance at the deposition of the disputant herself would demonstrate this aspect. He submits that the dispute itself was not maintainable as it did not set out material facts and particulars, rather they were suppressed. He submits that it is fallacious to contend that Rs.960/- was a paltry sum. It was a large sum at the relevant time. He submits that repeated resolutions were passed and reminders issued by the society. He submits that in such cases when people come together as a group, naturally, those making full contribution are at a benefit. There is no priority or seniority but payment on time is the sole criteria. He submits that by the

resolution of 7th December 1980 and the undertaking given by the petitioner, the above principle was adhered to and petitioner was aware of the same. She was fully aware that she would loose her right if full payment within the time limit set out is not made. Rs.31,000/- was the total contribution in one case. Petitioner was in financial difficulties. He invites my attention to the averments in the dispute application as also a letter dated 28th November 1977 addressed by the petitioner which would demonstrate that she was in financial difficulty. He also invites my attention to the true copy of resolutions passed by the General Body of the society. He submits that the petitioner is aware that for compliance with Section 26 of the MCS Act, it is necessary that she pays all her monies in time. She along with other similarly situated persons authorised the Managing Committee to take new members in case they fail to make payment by 31st January 1981. Therefore, when the resolutions are passed in presence of the petitioner and she is aware of her obligation but fails to discharge the same, then it is not open for her to claim any relief. Such is the conclusion of the Lower Appellate Court. The findings and conclusions are based upon materials

produced at the trial. They having been adverted to and findings based thereupon are not liable for interference in a writ petition under article 227 of the Constitution of India. He submits that payment was not made by the writ petitioner on 31st January 1981 but she purported to pay the amount of last instalment to the Secretary/Treasurer of the society allegedly on 4th March 1981. Allotment to new members was made on 19th February 1981. The cheque of the petitioner forwarded on 4th March 1981 was not encashed. Once there is no challenge to the resolutions passed on 7th December 1980 and 4th January 1981 so also factum of the Chief Promoter having a waiting list is not disputed, this is not a fit case for interference in writ jurisdiction.

27. He submits that the first petition is now prosecuted by heirs of a person who herself was not a share holder and a member. In such circumstances and the deposition of the disputants being unreliable and untrustworthy, they cannot succeed in these petitions.

28. Shri Karpe has invited my attention to the deposition of Shri Khanolkar (cross examination)

of society's witness and submits that the said witness admits that contribution of eight members were received after last date i.e. 31st January 1981. None of them have paid by the stipulated date but much later. According to him, this admission along with further admission that the society had not sent any notice to the petitioner for making payment of last instalment being on record, it is not possible to accept the arguments of the society's counsel Shri Govilkar. Therefore, in his submission, the petitions deserve to succeed.

29. As far as other petitions are concerned, they are also by persons identically situate and filing identical disputes with similar prayers. The contentions on their behalf are also identical. The society's case and submissions are also same. Therefore, the matter proceeded on this basis that the arguments on behalf of first petitioner would cover their cases as well.

30. With the assistance of learned counsel appearing for the petitioners, the society and the newly enrolled members I have perused the petitions, the judgements rendered by the Courts below and depositions of some of the material

witnesses. I have also perused the material and relevant documents including the resolutions of General Body.

31. In my view, there is much substance in the contentions of Shri Govilkar that the petitioners could not establish their case as set out in the dispute application. For the petitioners to succeed, it was necessary to plead and prove that each one of them has been enrolled as member or in any event is a share holder of first respondent society. Further, they have been held eligible for allotment of flat/tenement either of 500 sq.ft. or 640 sq.ft; as claimed in the dispute application. Thirdly, each one of them has paid the entire purchase price in time. Fourthly, they cannot be termed as defaulters and their exclusion from the list of allottees of tenements and flats, amounts to unlawful and illegal expulsion. It is only after the proof of these basic facts that the petitioners could have succeeded.

32. Leaving aside some minor and technical matters and going to the root of the controversy, the record reveals that the petitioners have miserably failed to show that they are share

holders or members of society. Some of them could not even produce a share certificate. Assuming without admitting that they could be said to be members because earlier instalments were accepted, yet, they do not deny that a general body meeting on 7th December 1980 was held at which they were present. A list of persons who had complied with Section 26 of the MCS Act, was prepared and shown to those attending the meeting of 7th December 1980. Upon noticing their names in the list of members who have not made full payment, the petitioners and such other members undertook to pay balance amount by 31st January 1981, failing which they stated that they have no objection if new persons are allotted the flats/tenements. The above actions were ratified as is clear from the minutes of meeting dated 4th January 1981. The petitioners have not been able to establish that they tendered the amount on or before 31st January 1981. Indeed, they could not even establish that on the date of allotment of flats to the new members on 19th February 1981 they had made full contributions. If that be the case, then they would not have placed reliance upon the communications received from the society on 25th February 1981. It only means that they were

aware of the obligations and that if they do not make their contributions in time, they would forfeit their right of allotment of a flat/tenement. They have made no attempt to pay the amount by 31st January 1981 or even before the date of allotment to the new members.

33. Once the record indicates that they authorised the society to include new members in case of their default, then it is not open to them to urge that even if contributions are not made in time, the society was not permitted to enroll new members and allot them flats or put them in possession thereof.

34. The first matter which has been argued at length reveals glaring omissions. The original petitioner Uma Mangesh Karnik in paragraph 3 of her dispute application pleads that the estimated cost was known to her. The quantum of contributions to be made was also known to her. She has averred that 80% amount was to come from loan and she has paid some amount Rs.5,120/-) by instalments from time to time. Her own averment on oath is that she made payment of last instalment of Rs.960/- by cheque No.D-647975 dated 12th February 1981. She states that this

cheque was accepted by treasurer dated 4th March 1981. It is thereafter she alleges that she was surprised and shocked to receive a letter dated 25th February 1981 on 7th March 1981 from the society informing that her request for allotment of flat could not be considered as she had not made payment of full contribution as agreed and undertaken.

35. If the averment is to be taken as it is, then, a cheque drawn by her on 12th February 1981 being purportedly tendered on 4th March 1981, would itself reveal non compliance with the condition of paying contribution on or before 31st January 1981. Her attempt to forward this cheque after more than a month of the due date and her complete silence with regard to the resolutions to which she was a party, would show that she has not approached the Court with clean hands. Rather, she did not disclose material facts to the Co-operative Court. Once such is her dispute, then naturally in the written statement the society referred to the resolutions and contents of paragraphs 6 and 7 of the original written statement completely destroy the case of the petitioner/disputant. The letter referred to by her is a copy of the society’s

letter which was shown to her when she approached the society's treasurer much after the due date and requested him to accept the cheque.

36. In the supplementary written statement, the case of the petitioner being a persistent defaulter, has been substantiated by the society by relying upon correspondence to which the petitioner is a party. Further, the society referred to the general body meeting, resolutions passed there-at and the minutes of the same, to substantiate the case that the petitioner is a defaulter.

37. It is after the occupation certificate was received that the society allotted the tenements and the petitioner having not abided by resolutions of the general body meeting naturally was not allotted the flat.

38. The Lower Appellate Court was in no error in relying on these materials so also deposition of the petitioner herself which contains admissions fatal to her case. For example, she in her examination in chief refers to the general body meeting and admits her presence there. She admits that full payment was not made till the

date of general body meeting and in any event till 31st January 1981. She admits that she has no share certificate. She admits in her cross examination that the attendance register of both meetings shows her name and signature. She admits that in the meeting a list of persons who have not made contributions, was read out. She had admitted that she does not know the date when she contacted the Secretary of the society to make payment of Rs.960/- before 31st January 1981. She does not prove the date and time when she had gone to see Secretary after 31st January 1981.

39. These are the state of affairs with regard to other petitioners as well. Even their dispute applications do not reflect the correct position. Their acts in defaulting to make payment in time have been established by the society by relying upon minutes of above meetings. Further, they also could not substantiate their pleas in the dispute application that they made payments of all instalments before the due date or in any event before the date of allotment to the members. In my view, the criticism of the petitioners' counsel with regard to the approach of Lower Appellate Court and the manner in which

the judgement is written, is justified. But that by itself would not carry the matter any further. The fallacious approach of the Lower Appellate Court and the manner of dealing with the matter, would not be of any assistance, if one goes to the root of the matter and considers the substance of the controversy. The petitioners had to substantiate their pleas in the dispute application by leading cogent and satisfactory evidence. They were duty bound to produce all materials and prove their allegation that the society wrongfully excluded them and chose others for allotment of flats/tenements. As observed above, apart from making vague allegations in the dispute application and not substantiating those which contained some particulars, the petitioners could not have expected to succeed. The concurrent findings of fact recorded by the Courts below in their cases, therefore, cannot be said to be based upon no material or evidence or perverse.

40. There is much substance in the complaint of Shri Govilkar that the petitioners themselves have to blame for the sorry state of affairs in which they have landed themselves. They could not complain about allotment to other members

when they authorised the Managing Committee to allot the tenements to others in case they do not make payment in time. For their own acts of omission and commission, they cannot blame the society and other members.

41. A perusal of the above referred materials as also the judgement rendered by the Lower Appellate Court, in my view, demonstrates that this is not a fit case for interference in writ jurisdiction.

42. In the result, Rule in each of these petitions is discharged with no order as to costs.

(S.C.DHARMADHIKARI, J.)